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IN THE

Supreme Court of the United States

October Term, 1953

No. 493

JACQUES CODRAY, *Petitioner*

v.

HERBERT BROWNELL, JR., Attorney General And Successor To The Alien Property Custodian, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF CCLUMBIA CIRCUIT

DAVID COBB
Counsel for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Jacques Codray prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 30) is unreported. The opinion of the Court of Appeals (R. 33) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1953. (R. 42) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether Section 5(b) of the Trading With the Enemy Act authorizes the Attorney General to keep Hungarian World War II enemy assets in a blocked status to avoid payment of American creditor claims in accordance with Section 34 of the Act.

II. Whether the Treaty of Peace with Hungary preserved or terminated the application of Section 34 of the Act to blocked Hungarian World War II enemy assets.

STATUTE AND TREATY INVOLVED

The pertinent statutory and treaty provisions are printed in the Appendix, *infra*, pp. 10-13.

STATEMENT

Under date of June 27, 1950, the Attorney General, pursuant to Section 34 of the Act,[1] determined that petitioner had a debt claim in the amount of $56,620.50, exclusive of interest, recoverable from any vested assets of United,[2] a Hungarian enemy corporation. (R. 14-15) There was also another approved creditor claim against United.[3] The vested assets of United, then being liquidated under Section 34, totaled only $37,457.35. Accordingly, a *pro rata* distribution[4] was made and petitioner received his

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[1] Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App. 1 et seq., as amended by Act of August 8, 1946, 60 Stat. 925, 50 U.S.C. App. 34. (App., p. 10)

[2] United Incandescent Lamps and Electrical Company.

[3] Wells Fargo and Union Trust Company was found to have an allowable claim in the amount of $10,049.39. (R. 14)

[4] In accordance with priorities fixed by Section 34(g) of the Act.

share, $28,560.83,[5] leaving unrecovered a balance of $28,059.67, exclusive of interest. (R. 15-16)

At the time of this distribution, unknown to the petitioner, other assets of United totaling at least[6] $207,000 were being kept by the Attorney General in a blocked status under Section 5(b) of the Act, as amended. 55 Stat. 839, 50 U.S.C. App. 5(b). (App., p. 10)

When the petitioner discovered these blocked assets, the petitioner levied an attachment against these assets and obtained judgment[7] against United in the Supreme Court of the State of New York.[8] (R. 17-19) Thereupon, the petitioner applied to the Attorney General for a license authorizing the payment of the amount of his judgment from the blocked assets of United. This application was denied on April 4, 1952. (R. 20) The reason given for the denial was that the disposition of blocked Hungarian property "is subject to determination of over-all governmental policy." (R. 20) Upon the petitioner's request for

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[5] The share received by Wells Fargo was $1,405.05. (R. 15) The balance of $7,491.47 had been first taken by the Custodian to cover taxes, if any, and expenses. (R. 13)

[6] The discovery of blocked assets is left to the diligence of creditors. The Attorney General may know of the existence of other blocked assets of United It is his policy to keep data on blocked assets secret. In this case the blocked assets of United consist of 13,500 shares of common stock of International Telephone & Telegraph Corporation, with a market value of about $200,000, held by J. P. Morgan Co., of New York City, and a cash balance of $7,000 in an account held by the Guaranty Trust Co., of New York City.

[7] The judgment is in the amount of $62,219.86, this sum being the allowed claim of $56,620.50 under Section 34, plus interest, and minus the payment made to the petitioner against this debt by the Attorney General. (R. 18-19)

[8] The attachment and judgment, still valid, are of the same type as those considered by this Court in *Orvis* v. *Brownell*, 345 U.S. 183, and the *Zittman Cases*, 341 U.S. 446; 341 U.S. 471.

reconsideration, the application was, on April 30, 1952, again denied. This time, the Attorney General in addition made reference to Article 29 of the Treaty of Peace with Hungary. (R. 21-22)

The Treaty of Peace with Hungary, 61 Stat., Part 2, 2109, which was concluded by the Allied Powers, became effective on September 15, 1947. Article 29 of the Treaty (App. p. 12) preserved the authority of our Government to seize and dispose of any Hungarian assets which had been caught in this country up to the time of the treaty. With respect to these Hungarian World War II enemy assets,[9] Article 29 provided that: (1) "The liquidation and disposition of Hungarian property shall be carried out in accordance with the law of the Allied or Associated Power concerned", and (2) the United States could use these enemy assets "within the limits of its claims and those of its nationals * * * including debts."

The petitioner, on May 28, 1952, brought this action in the District Court for the District of Columbia to obtain an Order directing the Attorney General at his election either to license payment from the blocked assets of United in an amount sufficient to pay petitioner's claim or to vest and pay petitioner's claim in accordance with the determination theretofore made under Section 34 of the Act. (R. 8-9) Each of the parties moved for summary judgment. The petitioner contended that under the plan of the Act, the Attorney General was required to use his blocking authority under Section 5(b) to accomplish and not to avoid the program of Congress provided in Section 34 of the Act.

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[9] Assets of Hungarian nationals which have come into this country since the Treaty are permitted to circulate freely and are not involved in this case. General License No. 94, issued December 7, 1945, 10 F.R. 14814, accompanied by Press Release No. 76 of the same date.

The District Court found the action was one against the sovereign to which it had not consented. (R. 30-31) The Court of Appeals found that jurisdiction would lie if petitioner's construction of the Act were correct. (R. 36) The Court of Appeals, however, affirmed the District Court on two grounds. It found, one, that the exercise of the authority to block under Section 5(b) was a "governmental" function which the Attorney General in his discretion could use either to accomplish or defeat the plan of Section 34, and, two, that even if the Attorney General had chosen to exercise his discretion to accomplish that plan, the Treaty of Peace with Hungary had terminated his authority to dispose of "blocked" Hungarian enemy assets under the Act. (R. 33-41)

REASONS FOR GRANTING THE WRIT

1. The Question Presented Under The Act And The Treaty Are of General Importance.

The Act embodies permanent legislation. Its provisions automatically come into effect with a declaration of war and automatically apply to all enemy assets. Questions concerning its construction are almost certain to recur. *Markham* v. *Cabell,* 326 U.S. 404, 413-415.

Article 29 of the Treaty of Peace with Hungary is wholly executory. Moreover, each of the other peace treaties, thus far made by the United States with World War II enemy countries,[10] contains a provision identical with, or similar to, Article 29.

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[10] Italy, Article 79, 61 Stat., Part 2, 1245 (1947); Bulgaria, Article 25, 61 Stat., Part 2, 1915; Rumania, Article 27, 61 Stat., Part 2, 1757; Japan, Article 14, U.S. Code Cong. Serv., 1951, p. 2730. In the cases of Bulgaria, Rumania, and Japan, as with Hungary, these articles are wholly executory. In the case of Italy, the blocked assets have been released, but only after Congress amended Section 32 of the Act to provide for the release.

The questions of construction presented are basic to our Government's program for administering blocked World War II enemy assets. In Section 34 of the Act Congress has laid down its plan for granting a preference in an equitable manner to the payment of American pre-war creditor claims out of enemy assets. The Court below holds that, under Section 5(b) of the Act, the Attorney General has an untrammeled and completely discretionary authority to disregard this plan in his administration of that portion of enemy assets which are blocked. The Court below holds in effect that the Attorney General may exercise the blocking authority to confine the operation of Section 34 to such enemy assets as he, in his discretion, may choose to vest. Clearly, if the blocking authority may be used in this manner, the Attorney General has the power to make a mockery out of Section 34. Moreover, if the blocking authority in Section 5(b) of the Act may be used at the choice of the Attorney General to defeat Section 34 of the Act, by precisely the same reasoning and authority the Attorney General may at his choice "block" the carrying out of Sections 9(a), 32, and 39 of the Act. Indeed, the view of the blocking authority taken by the Court below, and by the Attorney General in this case, would give to the Attorney General the power to avoid every provision that Congress has placed in the Act for the ultimate disposition of enemy assets.

Article 29 of the Treaty of Peace with Hungary was intended to preserve the authority of our Government to control and dispose of Hungarian blocked enemy assets "in accordance with the law" of the United States. The petitioner contends that the Act embodies the law of the United States referred to in the Treaty. But the Court below found to the contrary that Article 29 of the Treaty terminated the Act's applicability to the disposition of blocked Hungarian assets. It is well settled that the Act is the sole grant of power to the Executive to block, seize and dispose of enemy assets. *Guessefeldt* v. *McGrath*, 342

U.S. 308; *Silesian-American Corporation* v. *Clark,* 332 U.S. 469; *Brown* v. *United States,* 8 Cranch (U.S.) 110. Accordingly, under the decision below, there is now no applicable legislation, and the Executive branch is presently powerless to administer blocked World War II Hungarian assets. Since provisions analagous to Article 29 of the Hungarian Treaty are contained in each of our World War II peace treaties, under the decision below the Executive Branch is presently without power to administer virtually all World War II blocked enemy assets.

The amounts involved are large. In the case of Hungarian enemy property, out of a total of $6,412,644, there has been vested only $1,477,000, leaving still blocked a balance of $4,935,644. In the case of Bulgarian enemy property, out of a total of $3,320,199, there has been vested only $527,000, leaving still blocked a balance of $2,793,199. In the case of Rumanian enemy property, out of a total of $24,952,410, there has been vested only $924,000, leaving still blocked $24,028,410. Supplementary Report of War Claims Commission, 83d Cong., 1st Sess., H. Doc. No. 67, pp. 36, 156. Thus, in the case of these three former enemy countries alone, a total of $31,757,253 is still being kept blocked under the Act, awaiting seizure and distribution. Figures on Japanese blocked assets are not available to the Petitioner, nor is the Petitioner able to say how many creditor claims under Section 34 of the Act are being thwarted by the practice of the Attorney General that is validated by the decision below.

2. The Construction of the Act By the Court Below Runs Counter To Prior Decisions of This Court And To the Prior Administrative Construction of the Act.

This Court has often enunciated the principle that each separate provision of the Act must be read in the light of the full plan of the Act. *Guessefeldt* v. *McGrath,* 342 U.S. 308; *Clark* v. *Uebersee Finanz-Korp.,* 332 U.S. 480.

In construing the blocking authority under Section 5(b) as a separate, self-contained and all-powerful authority unrelated to Section 34 of the Act, the Court below has failed to give proper effect to the decisions of this Court. *Orvis* v. *Brownell,* 345 U.S. 183; *Propper* v. *Clark,* 337 U.S. 472, *Clark* v. *Uebersee Finanz-Korp., supra.*

The decision below also runs counter to the Act's prior administrative construction. This is illustrated by the following interchange which took place when the provisions which were later enacted into Section 34 were under consideration in Congress:

> Congressman Celler: "If property held by the Alien Property Custodian is not sufficient to pay debt claims against the property held by the Alien Property Custodian, is there any reason why property controlled by the Treasury should not also be made available for the payment of those claims?"
>
> Mr. Luxford: "No, Sir."
>
> Congressman Celler: "And you will make it available?"
>
> Mr. Luxford: "Yes, Sir. * * *" (Testimony of Mr. Luxford, Assistant General Counsel of the Treasury Department, Hearings on H.R. 4840 before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 78th Cong., 2d Sess., (1944) p. 107.

Mr. Luxford's answer is consistent with often repeated administrative declarations under the Act, each similarly representing that the power to block enemy assets is to be used to implement the directives of Congress for the disposition of enemy assets.[11] The view of the Attorney General in this case, and the ruling of the Court below, stand in sharp conflict with these prior administrative declarations.

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[11] Annual Report of the Office of Alien Property Custodian for Year Ending June 30, 1946, at page 8. Treasury Department, Press Service, No. S-337, May 20, 1947. Treasury Department, Press Service No. S-599, January 16, 1948.

3. The Construction By the Court Below of Article 29 of the Treaty Runs Counter To Prior Administrative Construction.

The Attorney General, for four consecutive years after the ratification of the Hungarian Treaty, has announced that Article 29 continued in effect his power under the Act to vest Hungarian assets blocked during the War, which power, as he explained, he was suspending solely "as a matter of policy." Annual Report of the Office of Alien Property, 1947, p. 2, ftn. 6; 1948, p. 2; 1949, p. 2; 1950, p. 2. The conclusion of the Court below denies that the Treaty continued any authority to vest such assets under the Act.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted:

DAVID COBB
Counsel for Petitioner

December , 1953.

APPENDIX

1. Trading with the Enemy Act, C. 106, 40 Stat. 411, as amended, 50 U.S.C. App. 1 et seq.:

* * * *

Sec. 5.

(b)

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *.

Sec. 34

(a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to Decem-

ber 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this Section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act [sections 1-6 and 7-39 of this Appendix] and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act [said sections], as amended, sections 1-6 of the Criminal Code, title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934, (ch. 327, 52 Stat. 631), as amended [sections 611-621 of Title 22]; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390 [sections 781-785 of this Appendix]). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act [section 21 of this title]; and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than

persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

* * * *

2. Treaty of Peace With Hungary, effective September 15, 1947 (61 Stat., Part 2, 2109):

* * * *

Article 29

1. Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property, rights and interests which at the coming into force of the present Treaty are within its territory and belong to Hungary or to Hungarian nationals, and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Hungary or Hungarian nationals, including debts, other than claims fully satisfied under other Articles of the present Treaty. All Hungarian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned.

2. The liquidation and disposition of Hungarian property shall be carried out in accordance with the law of the Allied or Associated Power concerned. The Hungarian owner shall have no rights with respect to such property except those which may be given him by that law.

3. The Hungarian Government undertakes to compensate Hungarian nationals whose property is taken under this Article and not returned to them.

4. No obligation is created by this Article on any Allied or Associated Power to return industrial property to the Hungarian Government or Hungarian nationals, or to include such property in determining the amounts which may be retained under paragraph 1 of this Article. The Government of each of the Allied and Associated Powers shall have the right to impose such limitations, conditions and restrictions on rights or interests with respect to industrial property in the territory of that Allied or As-

sociated Power, acquired prior to the coming into force of the present Treaty by the Government or nationals of Hungary, as may be deemed by the Government of the Allied or Associated Power to be necessary in the national interest.

5. The property covered by paragraph 1 of this Article shall be deemed to include Hungarian property which has been subject to control by reason of a state of war existing between Hungary and the Allied or Associated Power having jurisdiction over the property, but shall not include:

(a) Property of the Hungarian Government used for consular or diplomatic purposes;

(b) Property belonging to religious bodies or private charitable institutions and used for religious or charitable purposes;

(c) Property of natural persons who are Hungarian nationals permitted to reside within the territory of the country in which the property is located or to reside elsewhere in United Nations territory, other than Hungarian property which at any time during the war was subjected to measures not generally applicable to the property of Hungarian nationals resident in the same territory;

(d) Property rights arising since the resumption of trade and financial relations between the Allied and Associated Powers and Hungary, or arising out of transactions between the Government of any Allied or Associated Power and Hungary since January 20, 1945;

(e) Literary and artistic property rights.

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